No. 98-591

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

ALBERTSONS, INC.,
*Petitioner,*
v.
HALLIE KIRKINGBURG,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN MAHALLATI KYSELA
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Attorneys for *Amicus Curiae* The Chamber of Commerce of the United States of America

ANN ELIZABETH REESMAN *
CORRIE L. FISCHEL
McGUINESS & WILLIAMS
1015 Fifteenth St., N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for *Amicus Curiae* Equal Employment Advisory Council

* Counsel of Record

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The Equal Employment Advisory Council and The Chamber of Commerce of the United States of America respectfully submit this brief as *amici curiae*.[1] Letters of consent from both parties have been filed with the Court. The brief urges this Court to reverse the decision below, and thus supports the position of Petitioner Albertsons, Inc.

## INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its members include over 300 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the largest federation of business companies and associations in the world. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in court on employment

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[1] Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

law issues of national concern to the business community.

All of EEAC's members and many of the Chamber's members are employers subject to Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-12117 (Title I). Many own commercial facilities subject to Title III of the ADA, 42 U.S.C. §§ 12181-12189 (Title III), and many own, operate, lease, or lease to places of public accommodation, also subject to Title III. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities. Also, some members are the recipients of federal financial assistance and therefore are subject to the non-discrimination provisions of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 share a common definition of "disability" which establishes the parameters of the protected class under each statute. Both statutes define "disability" in terms of an impairment that "substantially limits" a major life activity. Thus, EEAC's and the Chamber's members have a direct interest in the issues presented in this case; *i.e.*, whether a particular impairment can be a disability *per se* regardless of whether the impairment substantially limits the individual in a major life activity, and whether employers may rely on federal government standards establishing minimum physical criteria, or establish their own standards which may exceed federal standards, in determining whether an individual is a "qualified" individual with a disability.



Because of its interest in the application of the nation's fair employment laws, EEAC has filed briefs as *amicus curiae* in numerous cases before this Court, the United States Courts of Appeals, and various state supreme courts. As part of this activity, EEAC participated as *amicus curiae* in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), which addressed the definition of a "disability" under the ADA. EEAC also participated as *amicus curiae* in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), and other cases in this Court construing the Rehabilitation Act of 1973. *E.g.*, *Alexander v. Choate*, 469 U.S. 287 (1985), *CONRAIL v. Darrone*, 465 U.S. 624 (1984); *University of Texas v. Camenisch*, 451 U.S. 390 (1981); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Similarly, EEAC and the Chamber have participated in numerous other employment discrimination cases before this Court. *E.g.*, *International Union UAW v. Johnson Controls*, 499 U.S. 187 (1991) (sex discrimination); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) (sexual harassment); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (sexual harassment); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) (after-acquired evidence); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (age discrimination). Thus, EEAC and the Chamber have an interest in, and a familiarity with, the issues and policy concerns involved in this case.

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of their experience in these matters, EEAC

and the Chamber are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

## STATEMENT OF THE CASE

Petitioner Albertsons hired Respondent Kirkingburg as a driver in its distribution center in Portland, Oregon in 1990. *Kirkingburg v. Albertsons, Inc.*, 143 F.3d 1228, 1230 (9th Cir. 1998). Albertsons requires that all of its truck drivers meet the minimum Department of Transportation (DOT) visual acuity standards of 20/40 corrected in each eye. Before Kirkingburg started the job, as well as several months later, examining physicians certified incorrectly that he met the DOT vision standards. *Id.* at 1230 n.2.

In late 1991, Kirkingburg fell from a truck while at work and was injured. Upon his return to work in November of 1992, Albertsons, in accordance with company policy, required Kirkingburg to obtain a current DOT certification. This time, the physician reported accurately that while Kirkingburg's vision was 20/20 corrected in the right eye, it was only 20/200 corrected in the left, thus failing the minimum DOT vision requirements. Based on this report, Kirkingburg was denied DOT certification, and Albertsons refused to reinstate him as a truck driver. *Id.* at 1231.

Several months later, Kirkingburg obtained a "vision waiver" from the DOT under an experimental program designed to obtain empirical data to study drivers with monocular vision, Albertsons, however, did not accept the waiver. *Id.* at 1231. Kirkingburg filed suit under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, alleging that Albertsons had discriminated against him based on his alleged disability. The district court granted summary judgment for Albertsons. 143 F.3d at 1230. The Ninth Circuit reversed and remanded, holding that (1) Kirkingburg is protected by the ADA because his limited vision renders him an individual with a disability under the ADA; and (2) Albertsons' requirement that truck drivers meet the DOT vision standards without a waiver is invalid. *Id.* at 1237. The Court granted Albertsons' petition for a writ of certiorari.



## SUMMARY OF ARGUMENT

The statutory definition of "disability" establishes the scope of the class protected under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.* Thus, the first element of the plaintiff's burden of proof in an ADA case is to show that he or she has a physical or mental impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment. 42 U.S.C. § 12102(2).

An individualized analysis is always required to determine whether an impairment rises to the level of a disability. *E.g., Baert v. Euclid Beverage*, 149 F.3d 626, 631 (7th Cir. 1998). The Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing the ADA, agrees that the statute requires such an individualized analysis. 29 C.F.R. § 1630 App. (Section 1630.2(j) Substantially limits). This Court conducted the individualized analysis required by the statute in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), as well as in a case interpreting the Rehabilitation Act, the ADA's predecessor, in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

The requirement of an individualized inquiry precludes any finding that *per se* disabilities can exist

under the ADA. The Ninth Circuit improperly disregarded that requirement when it concluded, based solely on a medical diagnosis, that the Respondent was an individual with a disability protected by the ADA, without determining whether he was *limited* in a major life activity.

Moreover, a ruling that *per se* disabilities can exist under the Act may potentially compromise the rights of those with true disabilities. Congress placed limitations on the length to which employers must go to provide reasonable accommodations by indicating that when doing so becomes an "undue hardship," the employer's obligations end. 42 U.S.C. § 12111(10)(a). If the scope of the protected class is interpreted too broadly, individuals without true disabilities may become entitled to accommodations, at the expense of someone truly in need. Therefore, the Court should not extend the coverage of the ADA to those not substantially limited in a major life activity by allowing *per se* disabilities under the statute.

The ADA permits employers to use physical criteria established by federal regulations or other federal standards to determine whether an individual is a qualified for a job. EEOC guidance supports such a finding. EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act IV-16 (1991) (hereinafter EEOC Technical Assistance Manual). Further, employers may utilize physical criteria, even if not contained in a federal government safety standard, to determine who is qualified when safety is at issue, as long as such criteria are job related and consistent with business necessity. *See* 42 U.S.C.§ 12113(a). This Court previously has held that using physical criteria to determine qualifications for a federally



funded program is acceptable under the Rehabilitation Act. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Employers who determine qualifications based on physical criteria should be able to rely on such standards without going through an individualized analysis as to whether the individual poses a direct threat to the health and safety of others. As long as the criteria are job related and consistent with business necessity, such criteria should be allowed under the ADA.

Public policy dictates that employers develop safety standards to protect the safety of the general public. Employers have an affirmative obligation to ensure that employees perform the essential functions of the job in a safe manner. Employers should be permitted to use qualification standards based on physical criteria so long as they are job related and consistent with business necessity. Otherwise, employers risk facing potential penalties under both civil and criminal law. Further, allowing individuals who are unable to meet the physical standards that define the essential functions of a safety-sensitive position to hold such positions places the public at risk. Congress did not contemplate such a result.

## ARGUMENT

### I. THERE ARE NO *PER SE* DISABILITIES WITHIN THE MEANING OF THE AMERICANS WITH DISABILITIES ACT

#### A. The ADA Requires an Individualized Inquiry to Determine Whether an Individual Has a Disability

Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117, prohibits discrimination in employment against a "qualified individual with a disability." 42 U.S.C. § 12112(a). The ADA defines "disability" as follows:

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

As the courts of appeals have held, the statutory definition of "disability" circumscribes the protected class by establishing a threshold requirement that all potential ADA plaintiffs must meet. Each alleged victim of disability-based discrimination must demonstrate, as the first element of his or her burden of proof, that he or she has a "disability" as defined in the law. *Soileau v. Guilford of Maine*, 105 F.3d 12, 14-15 (1st Cir. 1997); *Wernick v. FRB*, 91 F.3d 379, 383 (2d Cir. 1996); *Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir. 1997); *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 212 (4th Cir. 1994); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 50-51 (5th Cir. 1997); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998); *DeLuca v. Winer Indus.*, 53 F.3d 793, 797 (7th Cir. 1995); *Benson v. Northwest Airlines*, 62 F.3d 1108, 1112 (8th Cir. 1995); *Sanders v. Arneson Prods.*, 91 F.3d 1351, 1353 (9th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995); *Gordon v. E.L. Hamm & Assocs.*, 100 F.3d 907, 910 (11th Cir. 1996), *cert. denied*, 118 S. Ct. 630 (1997).[2]

[2] Title I of the ADA also prohibits discrimination against an individual "because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." 42 U.S.C. § 12112(b)(4). Thus, although the ADA will protect nondisabled individuals in this instance, this protection still flows from the existence of a disability. Moreover, the ADA generally prohibits retaliation, coercion, intimidation, threats, or interference against any individual who opposes acts that are unlawful under the ADA, who participates in a proceeding under the ADA, who exercises rights granted by the ADA, or who aids or encourages another in doing so. 42 U.S.C. § 12203. Again, however, protection is linked inextricably to disability.



The determination as to whether a particular plaintiff is protected by the ADA is an individual one. "The question of whether an impairment constitutes a disability and whether it substantially impairs a major life activity is an individualized inquiry, which must be determined on a case-by-case basis." *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 631 (7th Cir. 1998). Accordingly, "[c]ourts have been careful to distinguish impairments which merely affect major life activities and those which substantially limit major life activities." *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 870 (2d Cir. 1998).[3]

The Rehabilitation Act of 1973, the ADA's predecessor, also requires such an individualized analysis.[4]

[3] As the Chief Justice emphasized in *Bragdon v. Abbott*, "whether [an individual] has a disability covered by the ADA is an individualized inquiry. The Act could not be clearer on this point: Section 12102(2) states explicitly that the disability determination must be made with respect to an individual. Were this not sufficiently clear, the Act goes on to provide that the 'major activities' allegedly limited by an impairment must be those of such individual. § 12102(3)(A)." *Bragdon v. Abbott*, 118 S. Ct. 2196, 2214 (1998) (Rehnquist, C.J., concurring in part and dissenting in part). *See also id.* at 2217 (O'Connor, J, concurring in part and dissenting in part).

[4] The ADA definition of "disability" mirrors the definition of "handicapped individual" that appeared in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, at the time the ADA

"The definitional task cannot be accomplished merely through abstract lists and categories of impairments. The inquiry is, of necessity, an individualized one—whether the particular impairment constitutes for the particular person a significant barrier to employment." *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986).

The EEOC, the agency charged with enforcing Title I of the ADA, also interprets the statute as requiring an individualized analysis of whether an individual has a disability. In explanatory material accompanying its regulations interpreting Title I of the ADA, the EEOC explains in detail the need for an individualized determination of whether an impairment substantially limits a major life activity:

> Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.
>
> The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

29 C.F.R. § 1630 App. (Section 1630.2(j) Substantially limits).

The agency's position, that whether a person is an "individual with a disability" depends upon the degree to which the impairment affects the individual's major life activities, is consistent with the statutory language. Indeed, in its Technical Assistance Manual on the ADA, the EEOC stresses that "the determination as to whether an individual is substantially limited must always be based on the effect of an impairment on *that* individual's life activities." EEOC Technical Assistance Manual at II-4 (emphasis in original).

In *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), this Court conducted the necessary individualized analysis to determine that the individual in question was an "individual with a disability" protected by the ADA. First, the Court considered whether Abbott had an "impairment." *Id.* at 2202. Having determined that she did, the Court then considered whether the impairment substantially limited Abbott in a major life activity. *Id.* at 2205. Only then, after considering the medical evidence, did the Court conclude that Abbott was an "individual with a disability" protected by the ADA. *Id.* at 2207.[5]

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was passed, and the ADA's legislative history confirms the Rehabilitation Act as the source of the ADA definition. S. Rep. No. 101-116, at 21 (1989); H.R. Rep. No. 101-485, pt. 2, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 332; H.R. Rep. No. 101-485, pt. 3, at 27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 450.

[5] Having done so, the Court declined to address specifically whether *per se* disabilities could exist under the ADA. *Id.* at 2207.

Likewise, this Court has conducted the individualized analysis required by the Rehabilitation Act before determining that a plaintiff was covered by the statute. *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), involved a teacher who was terminated because her tuberculosis which had been in remission for twenty years, recurred three times in two years, and the school board feared contagion. *Id.* at 276. This Court's holding in *Arline* was that a person who meets the statutory definition of an individual with a disability is not disqualified from the protected class merely because the disability poses a threat of contagion. As part of its reasoning in *Arline*, however, this Court carefully considered the statutory definition before determining that Arline was a member of the protected class. The Court based this conclusion on the individualized evidence presented by the plaintiff about the extent to which her major life activities had been limited by her impairment. For this reason, the Court ruled, Arline had a "record" of a disability that placed her within the protected class. *Id.* at 281.

Since the ADA requires that an individualized analysis be conducted to determine if an individual has a disability, no impairment can be a disability *per se*. The Fourth and Seventh Circuits both have stated expressly that the ADA covers no disabilities *per se*. *Ennis v. National Ass'n of Business & Educ. Radio*, 53 F.3d 55, 60 (4th Cir. 1995); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 631 (7th Cir. 1998). The Seventh Circuit pointed out that *per se* disabilities cannot exist even when a disease, "as a practical matter" may always be found to be disabling. *Id.* at 631. In *Ennis*, the Fourth Circuit found that:



> the plain language of the provision requires that a finding of disability be made on an individual-[by]-individual basis. The term 'disability' is specifically defined, for each of subparts (A), (B), and (C), "with respect to the individual," and the individualized focus is reinforced by the requirement that the underlying impairment substantially limit a major life activity *of the individual.*
>
> * * * *
>
> Were we to hold that A.J. was disabled under the ADA, therefore, we would have to conclude that HIV-positive status is *per se* a disability. The plain language of the statute, which contemplates case-by-case determinations of whether a given impairment substantially limits a major life activity, whether an individual has a record of such a substantially limiting impairment, or whether an individual is being perceived as having such a substantially limiting impairment, simply would not permit this a [sic] conclusion.

*Ennis*, 53 F.3d at 60 (emphasis in original) (citations omitted).

The Ninth Circuit failed to make this individualized analysis to determine whether Kirkingburg was substantially limited in a major life activity. Instead, the court found that "the appropriate inquiry in cases such as this is whether, as a result of a physical impairment, the individual is required to perform a major life activity in a different manner from other persons." *Kirkingburg*, 143 F.3d at 1232 n.4. The Ninth Circuit thus ignored the pivotal statutory definition, which requires the court to examine whether an individual is actually limited.[6]

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[6] If the Ninth Circuit had considered whether Respondent's condition substantially limited his major life activities, it might have reached a different conclusion. For example, in

### B. Congress Did Not Provide for *Per Se* Disabilities Under the ADA

The legislative history of the ADA supports the interpretation that the Act's protection extends only to those individuals actually limited in a major life activity as a result of an impairment. The Committee Reports state unequivocally that "[a] physical or mental impairment does not constitute a disability under the first prong of the definition for purposes of the ADA unless its severity is such that it results in a 'substantial limitation' of one or more major life activities." H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted* in 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 22. As the Reports explain, "[a] person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 22.[7] Once again, Congress utilized language showing that it intended to protect individuals who were *restricted* as compared to others.

The approach taken by Congress was a functional one, as is evident from the example in the Committee Reports:

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*Still v. Freeport-McCoran, Inc.*, 120 F.3d 50 (5th Cir. 1997), the Fifth Circuit conducted the individualized analysis required by the statute and determined that a plaintiff with partial blindness was not an individual with a disability because he was not substantially limited in performing normal daily activities.

[7] The EEOC adopted these factors to define what is "substantially limiting" in its regulations interpreting Title I of the ADA. *See* 29 C.F.R. § 1630.2(j)(1)(ii).



> A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.

H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 22. This example confirms that Congress was focusing not on the abstract effects of a given impairment, but on how the individual actually was limited on a functional basis in performing the major life activity.

The Ninth Circuit erroneously focused on the impairment to Kirkingburg's eye, rather than on the extent to which it actually limited him in seeing. The Ninth Circuit's analysis effectively labels monocular vision a *per se* disability, contrary to the language of the statute.

The statutory definition of "disability" mandates an individualized inquiry into whether a physical or mental impairment substantially limits the individual in one or more major life activities. To declare, by judicial fiat, that an impairment is *per se* a disability undermines this important concept. Accordingly, this Court should make clear that there are no *per se* disabilities under the ADA.

### C. Recognizing *Per Se* Disabilities Would Compromise the Goals of the ADA

Throughout debate and passage of the ADA, Congressional sponsors reiterated the statute's important goal of extending opportunities to individuals with disabilities. As Senator Harkin stated, "For too long, individuals with disabilities have been excluded, segregated, and otherwise denied equal, effective, and meaningful opportunity to participate in the economic

and social mainstream of American life. It is time we eliminate these injustices." 135 Cong. Rec. S10711 (daily ed. September 7, 1989). This statement reveals that the purpose of the ADA is to extend statutory protection to those individuals who have disabilities that severely restrict their participation in activities that others enjoy. It is not intended to provide a vehicle for others to obtain protection to which they are not entitled. Creating coverage under the ADA for individuals based merely on the name of an impairment will expand the protected class well beyond the statutory definition, and create substantial problems for employers and employees.

In particular, an overly expansive reading of the protected class could well compromise the rights created by the ADA for those truly in need of statutory protection. The ADA requires that employers provide reasonable accommodation to individuals with disabilities unless doing so would impose an "undue hardship" on the employer's business. 42 U.S.C. § 12112(5)(a). While some accommodations, taken alone, will not impose an undue hardship, a number of accommodations in the aggregate may well reach that level. The greater the number of individuals entitled to accommodation, the sooner it is likely that the next person to need an accommodation will be denied one because providing the accommodation would impose an undue hardship on the employer's business.

In addition, an overly broad interpretation of the statutory definition also increases the possibility that the ADA will become a vehicle for employees with poor performance records to seek special rights in the workplace. Commissioner Russell G. Redenbaugh of the U.S. Commission on Civil Rights has voiced these very concerns. In his statement included in the



Commission's 1998 report on the ADA, Commissioner Redenbaugh, a blind individual, suggests that a broad reading of the ADA will impact individuals with disabilities negatively.

> An over-expansive application of ADA may create the impression that members of the class it protects become what is termed in human resources jargon "fire proof." The impression (and sometimes the reality) can also be that the "normal" standard (i.e., that if you are disabled and can do the job you are protected by the ADA) becomes distorted to the extent it becomes a tool which an employee may use to *become* "fire proof."

United States Commission on Civil Rights, Helping Employers Comply with the ADA 280 (1998). As another commentator observed: "Both just cause protection and the right to demand reasonable accommodation serve as powerful incentives for individuals to seek protection under the ADA. Employees can obtain protection before their employers have taken adverse employment action." Erica W. Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search For the Meaning of Disability*, 73 Washington L. Rev. 575, 585 (1998).

EEAC's and the Chamber's members have a long history of providing equal employment opportunities for individuals with disabilities, and a strong commitment to nondiscrimination. These exemplary employers support the goals of the ADA as applied to individuals with disabilities. Those goals will become clouded, however, if the expansion of the definition of what constitutes a disability under the ADA is expanded to recognize certain conditions as *per se* disabilities.

## II. THE ADA PERMITS EMPLOYERS TO USE PHYSICAL CRITERIA TO DETERMINE WHETHER AN INDIVIDUAL WITH A DISABILITY IS "QUALIFIED"

### A. The ADA Permits Employers to Rely on a Federal Regulation or Other Federal Standards With Physical Criteria

Title I of the ADA prohibits discrimination in employment against a "qualified individual with a disability," 42 U.S.C. § 12112(a), defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The employer's judgment as to what functions of a job are "essential" must be considered. *Id.* The ADA explicitly permits an employer to use "qualification standards, tests or selection criteria" even though doing so may screen out individuals with disabilities, provided that the employer can show that the standard, test or criterion is "job related and consistent with business necessity." 42 U.S.C. § 12113(a).

The ADA's legislative history reflects the drafters' concern that government standards established for safety and security sensitive positions be preserved, stating unequivocally that the ADA is not intended to "override any legitimate medical standards established by federal, state or local law, or by employers for applicants for safety or security sensitive positions, if the medical standards are consistent with [the ADA]." H.R. Rep. No. 101-485, pt. 3, at 43 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 446; H.R. Conf. Rep. No. 101-558, at 57-58 (1990).

The EEOC's interpretation of the ADA also supports this conclusion. According to the EEOC, "[t]he ADA does not override health and safety requirements established under other Federal laws. If a standard is required by another Federal law, *an employer must comply with it and does not have to show that the standard is job related and consistent with business necessity.*" EEOC Technical Assistance Manual at IV-16 (emphasis added). As examples, the EEOC states that "[a]n employee who is being hired to drive a vehicle in interstate commerce must meet safety requirements established by the U.S. Department of Transportation. Employers also must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration." *Id.*



The Rehabilitation Act also permits an employer to rely on federal safety standards. In *Chandler v. City of Dallas*, 2 F.3d 1385, 1395 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994), plaintiffs contended that the city's Driver Safety Program, which used standards based on Department of Transportation safety regulations that prohibit the employment of drivers with certain vision impairments and insulin-dependent diabetes, violated the Rehabilitation Act. The Fifth Circuit determined that the drivers were unqualified and held as a matter of law that "a driver with insulin-dependent diabetes or with vision that is impaired to the extent discussed in 49 C.F.R. § 391.41 presents a genuine substantial risk that he could injure himself or others." *Id.* at 1395. In concluding that individuals with such impairments could not be qualified because they could not meet the physical qualifications set forth for drivers by the Department of Transportation, the Fifth Circuit relied on the statutory language of the Rehabilitation Act, observing that the "definition of a qualified handicapped individual also includes a personal safety requirement—an otherwise qualified handicapped individual is defined as one who 'can perform the essential func-

tions of the position in question without endangering the health and safety of the individual or others.'" *Id.* at 1393. Indeed, the court warned, "Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which is involved in a vehicular accident." *Id.*

Thus, the legislative history, the EEOC's guidance, and the Rehabilitation Act all support the conclusion that employers may use federal safety standards as selection criteria without violating the ADA. Employers need not even demonstrate that the standard is job related and consistent with business necessity. A contrary interpretation of the ADA would compromise the safety of the public and lead to confusion as to an employer's obligation under federal law.

**B. The ADA Also Permits Employers to Use Physical Criteria Other Than Federal Standards to Determine Whether an Individual Is Qualified When the Safety of Others Is at Issue**

Where appropriate, the ADA also permits employers to use minimum medical criteria as qualification standards even where they are not mandated to do so by law. As noted above, the ADA's legislative history states that Congress did not intend that the ADA "override any legitimate medical standards established by federal, state or local law, *or by employers* for applicants for safety or security sensitive positions, if the medical standards are consistent with [the ADA]." H.R. Rep. No. 101-485, pt. 3, at 43, *reprinted in* 1990 U.S.C.C.A.N. at 466; H.R. Conf. Rep. No. 101-558, at 57-58 (emphasis added).[8] In-

[8] With limited exception, the legislative history reveals that Congress intended to prohibit employers from using standards that resulted in a blanket exclusion of individuals with certain disabilities. This general prohibition is distinct from what Congress *did* intend for employers to utilize, *i.e.*, standards based on certain physical abilities. *See* S. Lab. Rep. No. 101-116, at 27. This is an important distinction, because standards based on physical abilities address the individual's ability to do a certain essential function of the job, regardless of the type of disability an individual may have.



deed, "Under the legislation an employer may still devise physical and other job criteria and tests for a job so long as the criteria or tests are job-related and consistent with business necessity." S. Rep. No. 101-116, at 27.

In explaining what medical examinations for employees might be "job related and consistent with business necessity," the House Labor Committee stated:

> Section 102(c)(4) prohibits medical exams of employees unless job related and consistent with business necessity. Certain jobs require periodic physicals in order to determine fitness for duty. For example, Federal safety regulations require bus and truck drivers to have a medical exam at least biennially. In certain industries, such as air transportation, physical qualifications for some employees are critical. Those employees, for example, pilots, may have to meet medical standards established by Federal, State or local law or regulation, or otherwise fulfill requirements for obtaining a medical certificate, as a prerequisite for employment. In other instances, because a particular job function may have a significant impact on public safety, e.g. flight attendants, an employee's state of health is important in establishing job qualifications, *even though a medical certificate might not be required by law.*

H.R. Rep. No. 101-485, pt. 2, at 74, *reprinted in* 1990 U.S.C.C.A.N. at 356-57 (emphasis added). Similarly, the Conference Report explains:

> [I]n certain industries, such as air transportation, applicants for security and safety related positions are normally chosen on the basis of many competitive factors, some of which are identified as a result of post-offer pre-employment medical examinations. Thus, after the employer receives the results of the post-offer medical examination for applicants for safety or security sensitive positions, only those applicants who meet *the employer's criteria* for the job must receive confirmed offers of employment, so long as the employer does not use those results of the exam to screen out qualified disabled individuals on the basis of disability.

H.R. Conf. Rep. No. 101-558, at 59 (emphasis added). Hence, the legislative history also supports an employer's use of physical criteria beyond those promulgated by the federal government to determine qualifications to perform the essential functions of the job as long as the criteria are job related and consistent with business necessity.

The EEOC also confirms that an employer can use physical standards to determine job qualifications. In its interpretive guidance accompanying its ADA regulations, the agency specifically ties the statutory provision allowing employers to use selection criteria that are "job related and consistent with business necessity" to selection criteria such as "safety requirements, vision or hearing requirements, walking requirements, [and] lifting requirements . . . ." 29 C.F.R. § 1630 App. (Section 1630.10 Qualifications, Standards, Tests and Other Selection Criteria).[9]

[9] Thus, it would be inaccurate to subject such physical qualification standards to the more stringent "direct threat" analysis of 42 U.S.C. § 12113(b). Congress took the "direct threat" standard, which requires an individualized analysis, from *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), in which this Court remanded the question of whether a school teacher with tuberculosis was "otherwise qualified" for her position despite the contagion, and required an individualized inquiry into the nature, duration, severity and probability of the risk. *Id.* at 288. The rationale behind the use of an individualized "direct threat" analysis in this context is to prevent employers from making employment decisions based on unfounded stereotypes associated with certain types of disabilities. The use of physical criteria to set job qualifications, however, does not require this individualized analysis, because its focus is tied to the skills necessary to achieve the purpose and function of the job, as opposed to the traits associated with a certain disability.



The statutory language and legislative history cited above strongly indicate that Congress could not have meant for an individualized analysis to be conducted every time a qualification standard is at issue. The meaning of "standard" is "an acknowledged measure of comparison for quantitative or qualitative value." The American Heritage Dictionary (2d ed. 1982). The whole point of setting qualification standards is to be able to compare individuals, regardless of whether they have disabilities, by some objective measure that the employer ties to the function and purpose of the job. The standards themselves cannot, if employers are expected to run businesses, be analyzed on a case by case basis. Indeed, "[o]nce an individual has admitted that he does not meet such a necessary—as opposed to a merely convenient—standard, the Rehabilitation Act does not forbid the application to him of a general rule." *Buck v. DOT*, 56 F.3d 1406, 1408 (D.C. Cir. 1995) (upholding the Federal Highway Administration's decision to decline to waive its hearing requirements and allow deaf individuals to drive). *See also Ward v. Skinner*, 943 F.2d 157, 162-164 (1st Cir. 1991) (upholding Secretary of Transportation's denial of waiver of DOT rule excluding individuals with history of epilepsy from

driving commercial vehicles to plaintiff who had not experienced seizure in seven years), *cert. denied*, 503 U.S. 959 (1992).

This Court previously has recognized that standards utilizing physical criteria to select qualified applicants for participation in a federally-funded program are acceptable in an analysis of the Rehabilitation Act. In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), this Court held that an individual with a hearing disability was not qualified to participate in a nursing program due to the fact that she could not communicate effectively in the program. Noting that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap," *id.* at 407, this Court found that physical qualifications may be part of the program's requirements, observing that "[n]othing in the language or history of § 504 [of the Rehabilitation Act] reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program." *Id.* at 415.

In *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989), the Eastern District of Pennsylvania also approved the use of physical criteria to define qualification standards under the Rehabilitation Act. The court reviewed a Federal Bureau of Investigation (FBI) policy that excluded all individuals wtih insulin-dependent diabetes from special agent and investigation specialist positions.[10] The court rejected the notion that an individualized analysis should be conducted, since "there exists no reliable method of determining in advance those insulin-dependent diabetics who do not present a substantial risk of having a sudden and unexpected severe hypoglycemic episode while on a duty assignment." *Id.* at 517.

[10] It is important to note that this qualification standard did not exclude all individuals with a certain disability. Rather, it applied only to those with insulin-dependent diabetes.



In concluding that this policy did not violate the Rehabilitation Act, the district court judge explained why physical criteria used to establish job qualifications need not pass muster under an individualized analysis:

> . . . Congress' intent in enacting the Rehabilitation Act was not that employers must accept applicants for jobs where eminently qualified medical specialists are of the opinion that the job requirements pose a reasonably probable risk of harm to the applicant and others by reason of the applicant's "handicap," in this case being that of an insulin-dependent diabetic. Where, as here, qualified medical opinion is divided as to what is an acceptable degree of risk, a decision must be made.

*Id.* at 520.

This Court first used the phrases "business necessity" and "related to job performance" to establish the employer's burden in justifying selection criteria with an adverse impact on a protected class under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*, 401 U.S. 424, 431 (1971).[11]

[11] Since then, the *Griggs* standard was codified by the Civil Rights Act of 1991, which amended Title VII to provide that "[a]n unlawful employment practice based on disparate impact is established under this subchapter only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin and the

Since *Griggs*, the courts of appeals have applied this rule in cases involving challenges to safety-related qualification standards. For example, in *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993), the Eleventh Circuit examined the City of Atlanta's safety rule banning firefighters from wearing even closely-shaved beards—because facial hair interferes with the tight seal necessary for proper operation of a respirator or self-contained breathing apparatus (SCBA). *Id.* at 1114. The plaintiffs alleged that such a policy had a disparate impact on African-American males, who suffer disproportionately from a bacterial disorder that precludes them from shaving their faces. In finding that the City's policy was consistent with business necessity, the court held that "these safety claims would afford the City an affirmative defense, for protecting employees from workplace hazards is a goal that, as a matter of law, has been found to qualify as an important business goal for Title VII purposes." *Id.* at 1119. As the Eleventh Circuit explained, "[m]easures demonstrably necessary to meeting the goal of ensuring worker safety are therefore deemed to be 'required by business necessity' under Titl VII." *Id.*

In analyzing this issue, the Eleventh Circuit captured the important policy reason why such safety standards should be considered consistent with business necessity: "The mere absence of unfortunate incidents is not sufficient to establish the safety of shadow beards; otherwise, safety measures could be instituted only once accidents had occurred rather than in order to avert accidents." *Id.* at 1121. Although the city was not required to comply with

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respondent fails to demonstrate that the challenged practice is *job related for the position in question and consistent with business necessity* . . . ." 42 U.S.C. § 2000e-2(k) (1) (A) (i).



Occupational Safety and Health standards, the court looked to OSHA, National Institute for Occupational Safety and Health, and American National Standards Institute standards, which are voluntary private industry standards, as validation for the safety reasons behind the City's policy. The court further found that the plaintiffs were unable to show a less discriminatory alternative that would meet the City's legitimate business need. *Id.* at 1122.

The Eleventh Circuit also rejected the plaintiffs' argument that the policy violated the Rehabilitation Act, based on its analysis under Title VII:

> Because of the conceptual similarity between the Title VII less discriminatory alternative and the § 504 reasonable accommodation showings, this same evidence suffices to carry the City's initial burden of showing that there exists no reasonable accommodation that would permit the firefighters to perform the essential function of obtaining a safe seal on their SCBA's without being clean shaven.

*Id.* at 1127.

In addition to determining when facially neutral selection criteria are consistent with "business necessity" under Title VII in disparate impact cases, the courts also have addressed whether employers can intentionally exclude against an individual based on a protected characteristic such as age or sex based on a safety-related bona fide occupational qualification ("BFOQ").[12] This Court previously has acknowl-

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[12] Under Title VII, classifications based on religion, sex, or national origin are allowed "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e) (1). This same principle is applicable to the Age Discrimination in Employment Act. 29 U.S.C. § 623(f) (1).

edged that the "business necessity defense" under Title VII (which is the applicable standard under the ADA) is "more lenient for the employer than the statutory BFOQ defense" under Title VII. *International Union UAW v. Johnson Controls*, 499 U.S. 187, 198 (1991). In *Dothard v Rawlinson*, 433 U.S. 321 (1977), this Court found that women could be excluded from prison guard positions in an all-male maximum security prison because the "likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel." *Id.* at 335. Similarly, in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), this Court endorsed the use of a two part safety BFOQ defense in a case involving age related safety standards for flight engineers, although affirming the appellate court's ruling that the BFOQ standard was not met.[13]

Thus, even when an employer is intentionally targeting a certain protected group, this Court has found that safety standards are allowed when safety concerns are at issue. The use of physical criteria, however, does not intentionally target individuals with disabilities, nor are they a proxy for some qualification standards as age or sex were used in the cases discussed above. Therefore, this Court should permit employers to use physical criteria as qualifications as long as they are job related and consistent with business necessity.

[13] This Court rejected a BFOQ safety defense in *Johnson Controls*, in which the employer excluded fertile women from jobs that involved lead exposure. One primary reason for doing so, however, was this Court's finding that customer safety was not at issue in the case, observing that the "[t]he unconceived fetuses of Johnson Controls' female employees, are neither customers nor third parties whose safety is essential to the business of battery manufacturing." 499 U.S. at 203. This Court further noted that the employer did not present medical evidence to substantiate a real risk to the unborn fetuses. *Id.*



### C. Public Policy Dictates That Employers Be Permitted to Develop and Apply Adequate Standards to Protect the Safety of the Public

It is difficult to believe that Congress through passage of the ADA intended to discourage the development of safety standards in the workplace. A ruling that employers cannot set qualification standards that are job related and consistent with business necessity to compare qualified applicants or employees could achieve just such a result. It is an important goal that businesses and industries collectively attempt to self-regulate in the interest of public safety. Businesses may not, however, continue to make the effort to participate in self-regulation if such efforts will actually result in legal liability. Punishing employers who adhere to legitimate safety standards will create a disincentive to maintain needed safety standards.

Public policy dictates that employers be permitted to develop and apply safety standards to determine if an employee is qualified. Employers face bad publicity if they are perceived as endangering the safety of the general public. In addition, both private citizens and the government can sue employers if an employer's actions compromise the safety of the public, or even natural resources.

A highly publicized incident that demonstrates this reality is the *Exxon Valdez* accident. Because of its obligations under the ADA and the Rehabilitation Act, Exxon placed an individual with an alcohol problem in charge of a ship after he successfully completed

a rehabilitation program. Jon Cheney, *EEOC v. EXXON Corp.: Will Exxon's Blanket Exclusion of Former Substance Abusers Hold Up Under the ADA?* 48 Baylor L. Rev. 549, 550 (1996). After the ship hit a reef and starting spilling oil, Exxon "spent $2.5 billion dollars cleaning up the accident. Settling with federal and state authorities for criminal charges and civil libalities cost Exxon another $1 billion. And in 1994, an Alaska jury found Exxon reckless and assessed record punitive damages of $5 billion." *Id.*

Employers must take preventive measures to ensure that employees are able to perform the essential functions of the job in a safe manner. An employer that fails to do so will have a difficult time convincing a jury that it should not be accountable for damages because it was fulfilling its obligation under the ADA. While compliance with the ADA, as a federal law, may in theory preempt a state tort law claim as this Court discussed in *Johnson Controls*, once an accident has occurred, it will be difficult for an employer to show that it could not tell at the time that imminent danger was possible when standards, designed to show what criteria are necessary, were available. *See Johnson Controls*, 499 U.S. at 209. Indeed, Justice White's concurring opinion notes, "it will be difficult for employers to determine in advance what will constitute negligence." *Id.* at 215.

## CONCLUSION

For the foregoing reasons, *amici* Equal Employment Advisory Council and The Chamber of Commerce of the United States of America respectfully submit that the decision below should be reversed.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN MAHALLATI KYSELA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Attorneys for *Amicus Curiae*
The Chamber of Commerce
of the United States
of America

ANN ELIZABETH REESMAN *
CORRIE L. FISCHEL
McGUINESS & WILLIAMS
1015 Fifteenth St., N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council

* Counsel of Record